Supreme Court, U.S.
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79-1797

IN THE

Supreme Court of the United States

DONOVAN WIRE & IRON COMPANY,

Petitioner,

v.

WHEELING-PITTSBURGH STEEL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner:

Jolyon W. McCamic
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Wheeling, West Virginia

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INDEX

Petition for Writ of Certiorari 1
Reference to Opinions 1
Grounds on which Jurisdiction is Invoked 1
Judgment Sought to be Reviewed 1
Statute Conferring Jurisdiction 1
Question Presented for Review 1
Statement of Case 1-2
Basis for Federal Jurisdiction 2
Argument 2
Appendix 5

Tables of Cases

Cessna Aircraft Company v. Brown,
348 F2d 689 (10th Cir. 1965) 4
Crosley Corporation v. Hazeltine Corporation,
122 F2d 925 (3rd Cir. 1941)..... 4

Federal Rules of Civil Procedure

Rule 8 (c)..... 3
Rule 12(b) (2) 3
Rule 12 (h) 3
Rule 41 (b) 2, 5, 7, 8

Statutes

Title 28, Section 1254, United States Code 1
Title 28, Section 1332, United States Code 2

Law Review

65 Virginia Law Review 1031 2

PETITION FOR WRIT OF CERTIORARI

Reference to Opinions:

(1) *Wheeling-Pittsburgh Steel Corporation v. Donovan Wire & Iron Company,* F. 2d (4th Cir. 1980) decided February 12, 1980.

(2) *Wheeling-Pittsburgh Steel Corporation v. Donovan Wire & Iron Company,* District Court Order, dated October 12, 1978.

Grounds on which Jurisdiction Is Invoked:

(1) *Judgement Sought to be Reviewed:*
Judgement Order of the United States Court of Appeals for the Fourth Circuit, dated February 12, 1980.

(2) Statute Conferring Jurisdiction:

28 U.S.C. 1254; Court of Appeals, Certiorari; Appeal; Certified questions:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Question Presented for Review

Can a district court dismiss an action which has been stayed by another district court which has an identical action pending before that court?

Statement of Case

On May 5, 1976, Wheeling filed an action against Donovan in the United States District Court for the Western District of Pennsylvania.

On May 6, 1976, identical actions were filed in the United States District Court for the Northern District of Ohio and the United States District Court for the Northern District of West Virginia.

On July 1, 1976, Donovan moved in the United States District Court for the Northern District of Ohio for an order enjoining Wheeling from prosecuting its actions in West Virginia and Pennsylvania. This Order was granted on July 9, 1976. Wheeling appealed this order to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment on March 15, 1978.

On October 12, 1978, the United States District Court for the Northern District of West Virginia dismissed its action without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Wheeling appealed this order to the United States Court of Appeals for the Fourth Circuit which heard argument on October 4, 1979, and vacated the order of the District Court on February 12, 1980. It is from the February 12, 1980, judgment that review is sought by the petitioner, Appendix page.

Basis for Federal Jurisdiction

The basis for Federal jurisdiction is 28 U.S.C. 1332, Diversity of Citizenship; amount in controversy.

ARGUMENT

Without being presumptuous, the United States Court of Appeals for the Fourth Circuit has placed the district court on the horns of a dilemma. On one hand, the district court is being continually urged to improve its efficacy in administering its docket. The district court has attempted to follow the directions of not only the Fourth Circuit but also this Court and particularly the Chief Justice, 65 Va. L. Rev. 1031 (1979). The Fourth Circuit now directs the district court to reinstate this action even though the identical action is now being litigated in the Ohio district court.

Wheeling filed three identical actions, presumably it could have filed fifty, two of which were protective actions. The Ohio district Court, with the United States Court of Appeals for the Sixth Circuit affirming, enjoined the actions in West Virginia and Pennsylvania on the ground that "both in personam jurisdiction and satisfaction of the applicable statute of limitations" had been met in the Ohio district court, the two reasons given by the Plaintiff for filing identical protective actions in West Virginia and Pennsylvania.

The Fourth Circuit, in its opinion states: "Although it has been determined that the district court in Ohio has jurisdiction, this issue can be reexamined at any stage of the trial or appellate proceedings". While this may be true as a general statement of the law, it does not apply to the specific facts of this case. The two grounds for the protective actions, (1) personal jurisdiction and (2) statute of limitations, have been determined not be an issue in the Ohio action thus removing the basis for the protective actions.

In addition, Rule 8(c) of the Federal Rules of Procedure provides for pleading the statute of limitations as an affirmative defense.

Rule 12(b) (2) of the Federal Rules of Civil Procedure provides for the necessity of pleading the defense of lack of jurisdiction over the person.

Finally, Rule 12 (h) provides for the waiver of both personal jurisdiction and statutes of limitation where not pleaded. The Ohio district court and the Sixth Circuit find both "not to be in issue".

The Fourth Circuit further states, "if its jurisdiction failed in Ohio, Wheeling-Pittsburgh could be confronted with a plea of limitations should it fail recovery in West Virginia without the benefit of its protective action". The Fourth Circuit is dealing in pure speculation. The only reason for filing the protective actions was for personal jurisdiction and statue of limitations purposes.

Cessna Aircraft Company v. Brown, 348 F2d 689 (10th Cir. 1965), was an application for a writ of mandamus and prohibition seeking to prevent cases being transferred from

the Kansas district court to the Louisiana district court in which identical actions were pending. The Court issued the writ because the Court of Appeals for the Fifth Circuit had not ruled as to the jurisdictional issue.

In the instant case, the Sixth Circuit has made that ultimate finding of jurisdiction in the Ohio district court. Ergo, the West Virginia district court may dismiss the action since only the merits of the action remain to be determined.

> " . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties." *Crosley Corporation v. Hazeltine Corporation*, 122 F 2d 925 (3rd Cir. 1941).

If such language can be contained in a 1941 case, it can be said one hundred fold in 1980. At this stage of the proceedings there have been three separate identical actions filed in three separate federal jurisdictions. Issues have been determined in the district court of Ohio with ultimate determinations made in the Sixth Circuit. Issues have been determined in the West Virginia district court with ultimate issues being determined by the Fourth Circuit. "Public policy" indeed requires the avoidance of any waste of judicial time and energy. It would appear that this case presents to this Court a perfect opportunity to speak to the efficient administration of justice, a most vital issue to this Court, the entire Federal Judicial System and litigants.

Respectively submitted,

/S/Jolyon W. McCamic
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 78-1897

WHEELING-PITTSBURGH STEEL CORPORATION,

v. Appellant,

DONOVAN WIRE AND IRON COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Charles H. Haden, II, District Judge.

Argued: October 4, 1979 Decided: February 12, 1980

Before BUTZNER, WIDENER, Circuit Judges, and ROSZEL THOMSEN, United States District Judge for the District of Maryland, sitting by designation.

T. Lawrence Palmer (Hollinshead and Mendelson; Ronald E. Wilson, Jordan & Wilson on brief) for Appellant; Jolyon W. McCamic (McCamic & McCamic on brief) for Appellee.

BUTZNER, Circuit Judge:

Wheeling-Pittsburgh Steel Corporation appeals from an order of the district court dismissing without prejudice its suit against Donovan Wire and Iron Company. We vacate the order and remand for reinstatement of the complaint.

Wheeling-Pittsburgh steel claims more than a million dollars from Donovan on a contract of guaranty. Shortly before the statute of limitations ran, Wheeling-Pittsburgh filed three identical federal actions in Pennsylvania, Ohio, and West Virginia. Donovan responded only in the Ohio district court, where it filed an answer, counterclaim, and motions for temporary and permanent injunctions to prevent

prosecution of the other suits. That court granted the injunction finding that the suit was properly before it because it had personal jurisdiction and the statute of limitations had not run. The Court of Appeals for the Sixth Circuit affirmed this order, and the case is proceeding in Ohio.

Two years later, the West Virginia district court dismissed the action filed there, without prejudice under Federal Rule of Civil Procedure 41 (b), for administrative reasons. No motion to dismiss for want of prosecution had been filed, nor did Donovan present any evidence of harassment, bad faith, or abuse of judicial process. Wheeling-Pittsburgh, claiming potential prejudice, appealed.

Although it has been determined that the district court in Ohio has jurisdiction, this issue can be reexamined at any stage of the trial or appellate proceedings. If jurisdiction fails in Ohio, Wheeling-Pittsburgh could be confronted with a plea of limitations should it seek recovery in West Virginia without the benefit of its protective action. *See, e. g.,* Andrew v. Bendix Corp., 452 F. 2d 961 (6th Cir. 1971); Riley v. Union Pac. R. R., 182 F. 2d 765 (10th Cir. 1950). For our purposes we need not determine whether Wheeling-Pittsburgh would prevail on this issue. *See, e. g.,* Abele v. A. L. Dougherty Overseas, Inc., 192 F. Supp. 955 (N. D. Ind. 1961); McCrary v. U.S. Fidelity & Guaranty Co., 110 F. Supp. 545 (W.D.S.C. 1953). It is sufficient to note that the dismissal of the West Virginia action could impose on Wheeling-Pittsburgh the burden of litigation that its protective suit was designed to prevent.

Prudent lawyers should not be faulted for guarding their clients against possible pitfalls. A court's concern over the institution of actions on the same claim in more than one district can be alleviated by an order staying the proceedings. In the absence of harassment, we deem dismissal of this action, though nominally without prejudice, to be unwarranted because it could spawn expensive litigation of issues that Wheeling-Pittsburgh has sought to avoid.

The order of the district court is vacated, and the case is remanded with directions to reinstate the complaint. Wheeling-Pittsburgh shall recover its costs.

IN THE UNITED STATED DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

WHEELING-PITTSBURGH STEEL CORPORATION,

Plaintiff,

vs. Civil Action No. 76-19-W (H)

DONOVAN WIRE AND IRON COMPANY,

Defendant.

ORDER

The Court by Order dated September 18, 1978, requested that all parties to the above styled action state by October 4, 1978, why the above action should not be dismissed without prejudice and stricken from the docket of the Court.

The Plaintiff sent a memorandum to this Court, dated October 3, 1978, in which it stated that dismissal under *Rule* 41(b) of the Federal Rules of Civil Procedure, if with prejudice, could be res judicata in other pending actions.

The Plaintiff misconceives the proposed action of this Court, in that the Court indicated in the September 18 Order that a dismissal under *Rule* 41(b) would be without prejudice. The Court is aware that the Plaintiff has been enjoined from proceeding with this action by the United States District Court for the Western District of Ohio, but it was the action of the Plaintiff in filing the suit in three separate district courts that precipitated the injunctive action on behalf of the Defendant. This Court cannot be expected to leave this case on its active docket while the

Plaintiff has been enjoined from proceeding with this action by the United States District Court for the Western District of Ohio, but it was the action of the Plaintiff in filing the suit in three separate district courts that precipitated the injunctive action on behalf of the Defendant. This Court cannot be expected to leave this case on its active docket while the Plaintiff litigates the merits in another forum. See *Maxey v. Citizens National Bank of Lubbock, Texas,* 459 F. 2d 56 (5th Cir. 1972).

This action was filed in this district on May 6, 1976. It has been over two years since the complaint was filed and there has been no further action in the case. Therefore, the Court feels that a dismissal under *Rule* 41 (b) would be in order.

The Court hereby ORDERS that the above styled civil action be dismissed without prejudice pursuant to *Rule* 41 (b) of the Federal Rules of Civil Procedure.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: October 12, 1978.

United States District Judge